89-131

SUPREME COURT, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1989

CLYDE STORIE, Individually and in his official capacity as a County Sheriff, Thurston County, Nebraska; and DANIEL WHITTED, Individually and in his official capacity as a Deputy County Sheriff,

Petitioners,

vs.

KENNETH DUNCAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a police officer entitled to immunity from trial as a matter of law if he arrests a suspect for a misdemeanor within the threshold of the suspect's doorway without exigent circumstance or a warrant but as part of a lawful arrest begun while the suspect was in a public place?

2. Is a police officer entitled to application of the *Harlow* test as a basis for qualified immunity from trial for a claimed violation of a suspect's civil rights by reason of the application of excessive force at the time of the suspect's arrest?

3. In a remand for trial of a pivotal question of fact with regard to the right of qualified immunity, is a police officer entitled to a separate full trial on the fact specific issue relative to the question of qualified immunity prior to a trial of the merits of the underlying case?

LIST OF PARTIES

Parties to the proceedings below were the Petitioners, Clyde Storie, in his individual capacity and in his capacity as Sheriff of Thurston County, Nebraska, Daniel Whitted, individually and in his official capacity as Deputy County Sheriff, and the Respondent, Kenneth Duncan.

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CLYDE STORIE, Individually and in his official capacity as a County Sheriff, Thurston County, Nebraska; and DANIEL WHITTED, Individually and in his official capacity as a Deputy County Sheriff,

Petitioners,

vs.

KENNETH DUNCAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, Clyde Storie and Daniel Whitted, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on March 13, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 869 F.2d 1100, and is reprinted in the appendix hereto, p. 13a, *infra*.

The memorandum decision of the United States District Court for the District of Nebraska (Urbom, D.J.) has not been reported. It is reprinted in the appendix hereto, pp. 1a and 4a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, Duncan brought this suit in the United States District Court of Nebraska, sitting at Lincoln. On September 1, 1987, the Nebraska Federal District Court denied the Defendants' Motions for Summary Judgment based on qualified immunity of Storie and Whitted. See pp. 1a and 4a, *infra*.

On their appeal, the Eighth Circuit on March 13, 1989, entered a judgment and an opinion affirming the Trial Judge's Order and remanded the matter back to the Trial Judge for trial in accordance with his Memorandum Opinion, as amended on November 4, 1987. See p. 13a, *infra*. A Petition for Rehearing was filed, and overruled by the Eighth Circuit on April 18, 1989. See p. 23a, *infra*.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1). See p. 24a, *infra*.

STATUTE INVOLVED

No controversy exists which directly affects the interpretation or application of a federal statute with regard to this matter.

STATEMENT OF THE CASE

The Plaintiff, Kenneth Duncan, on December 26, 1985, was the Chief of Police and served on the volunteer fire department of the town of Emerson, Nebraska. On that date, he was arrested by the Defendants, Sheriff Clyde Storie of Thurston County, Nebraska, and his deputy, Daniel Whitted. He was arrested at his home and taken into custody for commission of a misdemeanor. He was arrested without a warrant and he claims that his arrest was unlawful and constituted a violation of his civil rights under the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and that Storie and Whitted used excessive force, thereby depriving him of his constitutional rights. On March 10, 1986, he filed a Complaint in the United States District Court for the District of Nebraska, invoking the Court's jurisdiction under 28 U.S.C. §§1331, see p. 24a, *infra*, and 1343 (1), (2), (3), and (4), see p. 24a, *infra*.

Storie and Whitted have asserted a qualified immunity from suit, claiming that the arrest procedure which they followed was made in a good faith belief that the arrest was appropriate and lawful. They filed a Motion for Summary Judgment with the United States District Court, which Motion was overruled. The Court, in its Memorandum Opinion, found that there was a conflict of

evidence with regard to pivotal facts upon which the Defendants based their request for a qualified immunity. The Trial Court, in its Amended Memorandum Decision, provided that the disputed pivotal fact issue should be submitted to a jury as a part of the trial of all of the issues of the case.

For purposes of the Motion for Summary Judgment, the following facts were undisputed by the parties. On December 26, 1985, the Plaintiff, Kenneth Duncan, called from his home in Dixon County, Nebraska, to the offices of Sheriff Storie in Pender, Thurston County, Nebraska, and asked to talk with Sheriff Storie. Sheriff Storie conversed with Mr. Duncan. The subject of the conversation had to do with the failure of Mr. Duncan to appropriately report the transportation of a dead body from the place of death in Thurston County, to a local hospital in Emerson. Emerson, although a small Nebraska town, is so situated that its geographical boundaries include portions of Dixon, Thurston, and Dakota Counties.

Duncan admits that during the phone conversation, he called Sheriff Storie a "fucking asshole", and threatened to haul his "fucking shrimpass into Court".

At the time of this incident, *Neb. Rev. Stat.* §28-1310 (Reissue 1985) provided that intimidation by phone call is a class III misdemeanor if the call is made with the intent to annoy or offend and uses language that is at least indecent. See p. 26a, *infra*. The statute provides that the use of indecent, lewd, or obscene language shall be *prima facie* evidence of the intent required by the statute. The Trial Court found in its Memorandum in response to the Defendants' Motion for Summary Judgment, that the

Defendants had probable cause to believe that Kenneth Duncan had violated the statute.

Further, Nebraska had in force and effect at the time of the incident, *Neb. Rev. Stat.* §29-404.02, (Reissue 1985), which empowered a police officer or peace officer to make a warrantless arrest in cases in which the officer had reasonable cause to believe that a misdemeanor had been committed in the officer's presence. See p. 27a, *infra.* The Trial Court found that although Sheriff Storie and Deputy Whitted were not physically present in Duncan's home at the time that Duncan placed the call, the offense may be considered to have been committed in Sheriff Storie's presence; that the call was directed to Storie and he participated in the conversation, both of which could have given Storie reasonable cause to believe that a misdemeanor was being committed in his presence.

Further, the Trial Court found, and the fact is, that there is no statute or court decision which limits the authority of a peace officer to make an arrest for the commission of a misdemeanor performed in his presence to any limited territorial jurisdiction.

It is further undisputed that after the conclusion of the phone call, Sheriff Storie proceeded with Deputy Whitted to the home of Kenneth Duncan in Emerson, Nebraska, and further, that Kenneth Duncan's home was located in that portion of town that was situated in Dixon County, Nebraska. In deposition, Kenneth Duncan testified that he saw Sheriff Storie's car come around the corner and come down the street towards his home. He put his dog in a closet because the dog had a tendency to bark when people came to his door. He secured a report

he had written concerning the transfer of the dead body, and he proceeded to the front door of his residence and opened the door. Sheriff Storie and Deputy Whitted were just mounting the steps of his front porch when Duncan opened the door. Duncan and Storie engaged in conversation, and at all times during that conversation, Storie and Whitted remained on the front porch of the Plaintiff's home.

There then exists a divergence in the testimony with regard to the location of Mr. Duncan once he opened his door and commenced his conversation with Sheriff Storie. According to the deposition of Sheriff Storie, he asked Duncan to step out on the front porch and Duncan did so, and thereafter, the arrest took place. According to the deposition of Kenneth Duncan, when he learned that Sheriff Storie did not want his report, he attempted to thrust the report at Sheriff Storie and close the screen door or outer door of his home when Sheriff Storie grabbed his arm and pulled him out on the porch.

It is undisputed that Duncan wrestled with Sheriff Storie and that Dan Whitted applied a battery-operated "stun gun" to Kenneth Duncan to facilitate his arrest. A stun gun is a device used by peace officers that has the effect of interfering with certain nerves in the system, causing the subject to, in effect, become relaxed and nonresistent to arrest. It is used in lieu of a club or other instrument which might cause physical injury.

Duncan was then taken back to Pender, Nebraska, where he was booked and released.

It is undisputed that the Defendants did not have a warrant to arrest Kenneth Duncan.

It was the position of the Defendants in the Motion for Summary Judgment that they were authorized to make an arrest without a warrant by reason of the Nebraska statute which authorizes and empowers a police officer to arrest an individual who has committed a misdemeanor in the presence of the police officer, and such arrest may be made without a warrant. It is the position of the Defendants that the arrest was made in a public place or that a police officer could reasonably believe that the arrest was made in a public place.

The Trial Court, in overruling the Defendants' Motion for Summary Judgment on the issue of qualified immunity, found that a conflict of fact existed with regard to whether or not the arrest took place outside of Kenneth Duncan's home on the porch as testified to by Sheriff Storie, and therefore, was an arrest in a public place, or in fact took place as described by Kenneth Duncan, in which he testified that the Defendants reached into his home and pulled him out of the threshold of his doorway and onto the front porch as part of the arrest. The Trial Court, in effect, took the position that the Nebraska statute which authorizes a police officer to make an arrest without a warrant of a person who has committed a misdemeanor in his presence, does not empower or authorize a police officer to enter the home of the suspect to make an arrest without a warrant, because such an arrest would be in violation of the Fourth Amendment rights of the suspect with regard to his right of privacy.

The Defendants contend that although there is a dispute of fact concerning the position of Kenneth Duncan at the time of his arrest, the disputed fact is not material in that under either version of the facts the Plaintiff was in a

public place, or a reasonable police officer could believe the suspect was in a public place at the time of his arrest. It is the contention of the Defendants that the undisputed facts establish that Kenneth Duncan placed himself voluntarily in the threshold of his doorway and that consistent with the decision of the United States Supreme Court in *United States v. Santana*, 427 U.S. 38 (1976), the plaintiff was in a public place and had no expectation of privacy at the time of his arrest, or at the very least, that a reasonable police officer could believe that he was in a public place and had no expectation of privacy.

The Eighth Circuit found that under Duncan's version of the facts, namely that when it was apparent that the officers had not come for his report, he stepped further back into the house and attempted to close the door when at that moment he claims he was pulled from his home by the officers. The Eighth Circuit asserts that a jury could find that his attempted retreat, much like the suspect in *Santana*, placed Duncan firmly inside his home and the officers would be required to demonstrate exigent circumstances.

It is the contention of the officers that the policy of this Court as announced in *Santana* is that one who places himself voluntarily in the threshold of his doorway has no expectation of privacy, and that once a warrantless arrest has begun, when he is in such a public place, that arrest lawfully begun may be pursued and continued even though the subject attempts to retreat within his premises, or at least as a matter of law, a reasonable officer could so believe at the time that the arrest was made of Kenneth Duncan. It is the contention of the Defendants that the Eighth Circuit is in error in asserting

a principle that a warrantless arrest for a misdemeanor once begun in a public place would require a presence of exigent circumstances to continue that arrest if the subject attempts to resist by retreating into his home.

The Eighth Circuit, in affirming the Trial Court's Order, has remanded the matter back for trial. By his Memorandum Opinion, the Trial Court indicated that the issue of fact upon which qualified immunity would pivot would be submitted to the jury with instructions in accordance with the case of *Warren v. City of Lincoln*, 816 F.2d 1254, 1262 (8th Cir. 1987).

The procedure for the trial of fact as set forth in *Warren* would submit the issue of fact pivotal to qualified immunity to the jury along with all of the factual issues of the underlying case.

It is the position of Storie and Whitted that if such an issue must be tried to a jury, such trial should be a separate trial on the fact specific issue and a verdict rendered on that fact issue prior to a trial on the issues of the underlying case.

Further, the Eighth Circuit found that a fact issue existed relative to Duncan's claim of excessive force under the four pronged test applied by the Circuits in cases such as *Putnam v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981). It is the position of Storie and Duncan that the objective test of *Harlow* should be applied in excessive force cases to determine if the officers are entitled to qualified immunity from such claim.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's doctrine that a person who has voluntarily presented himself to a police officer in a public place may reassert his right to privacy by an attempt to retreat into his home, thus defeating a lawful arrest begun while he was in the public place without a warrant or exigent circumstance, conflicts with the decisions of this Court and other circuits.

The Eighth Circuit in *Storie* reasons that if Kenneth Duncan's assertions of fact surrounding his arrest are found to be true by the trier of fact, he may simply defeat a lawful arrest by the mere expediency of attempting to retreat into the confines of his home. The Court in effect establishes the policy that if police officers have begun an arrest in a public place, the subject may terminate the arrest by simply turning and moving into his home, thus effectively nullifying the arresting procedure. The Court would require that the officers must either obtain a warrant or be faced with exigent circumstances before continuing with the arrest.

The authority to follow a suspect into the home if the arrest began in the threshold of the house is found in *United States v. Santana*, 427 U.S. 38 (1976). There, this Court held that an arrest without warrant or exigent circumstance begun in the threshold of the suspect's doorway is an arrest begun in a public place and need only be supported by probable cause. The complexion changes if the subject is within his home and has an expectation of privacy. As noted in *Payton v. New York*, 445 U.S. 573 (1980), the Fourth Amendment protects

against unreasonable search and seizure without a warrant or unless significant exigent circumstance is present to justify an intrusive arrest without a warrant.

Although the opinion in *Santana* noted that elements of exigent circumstance were present, the Court did not condition its holding on exigent circumstance. The Court simply held that once an arrest is set in motion in a public place, the arresting officer may follow the suspect into the home to complete the arrest. The clear, unambiguous holding of this Court was:

> We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *Watson*, by the expedient of escaping to a private place . . .

As recently as 1986, the Eighth Circuit seems to perceive a split of authority in the circuits with regard to whether an arrest in the threshold of a doorway is an arrest in a public place as enunciated in *United States v. Watson*, 423 U.S. 411 (1976). In *United States v. Davis*, 785 F.2d 610, 615 (8th Cir. 1986), the Court stated:

> . . . When a person is arrested at the doorway, as was Davis, the circuits are split as to whether this constitutes a house arrest and is improper. Compare *United States v. Whitten*, 706 F.2d 1000, 1015 (9th Cir. 1983) (relying on *United States v. Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 2409, 49 L.Ed.2d 300 (1976), court found no warrant required because doorway is a public place) . . . *with United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984)(location of arrested person, not arresting officer, determines whether situation is a home arrest) . . .

In *Davis*, the suspect was arrested in his doorway without a warrant and charged with rape. The Eighth

Circuit after having referenced "a split" in the circuits on the issue of arrest in a doorway without warrant, then justified an arrest on grounds of probable cause and exigent circumstance coupled with a finding that there existed no egregious conduct on the part of the officers at the time of arrest.

In *Davis*, the Eighth Circuit noted that exceptions to valid warrantless arrests in doorways were found in circuit decisions. *United States v. Howe*, 603 F.2d 1297, 1300 (8th Cir. 1979) (deliberate delay); *United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984) (coercive behaviour); and *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980) (deceptive practices).

The Eighth Circuit now in *Storie*, for all intents and purposes, reintroduces the requirement of exigent circumstance in a doorway arrest.

It is respectfully suggested that the cases cited by the Eighth Circuit do not constitute a split within the circuits concerning application of *Santana*, but rather, all of the cases cited outside of the Eighth Circuit deal with circumstances wherein the subject or suspect did not enter the threshold voluntarily and thus did not waive the right of privacy.

In *Storie*, the Eighth Circuit has adopted the rule as proposed by Mr. Justice Marshall in his dissent in *Santana*, as the operative rule in the Eighth Circuit rather than the rule as pronounced by the Court majority. Justice Marshall, in his dissent in *Santana*, forcefully calls for exigent circumstance as a criterion for a warrantless arrest in the doorway of the home, which, of course,

merely extends to the doorway the same right of privacy as is extended to the suspect in the interior of the home.

In any event, the Eighth Circuit again brushes over the objective standard of measurement of the officers' actions in support of application of the doctrine of qualified immunity as established by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 55 U.S.L.W. 5092 (1987). Although the Court posits the argument of Storie and Whitted that, in light of *Santana*, a reasonable arresting officer could believe that he was empowered to arrest Duncan in the doorway of his home without a warrant because he voluntarily placed himself there, the Court never responds to the issue except to find that because a question of fact exists with regard to the ultimate issue of whether Defendants breached Duncan's constitutional right, therefore there cannot exist a right of qualified immunity.

It is clear that the distinction between the ultimate question of whether the Plaintiffs' constitutional rights were violated and the question of whether as measured by the clearly established law a reasonable officer could believe he was acting properly, is not applied in the Eighth Circuit. It was not applied in *Creighton*, and it was not applied in *Storie*.

Petitioners respectfully submit to this Court that if *Storie* is not reversed, the requirement of exigent circumstances in arrests in a suspect's doorway becomes controlling precedent in the Eighth Circuit and *Storie* will afford a precedent for other circuits to chip away at the fundamental holding in *Santana*. Petitioners submit that a

reversal of *Storie* will significantly further define, clarify, and affirm the principals enunciated in *Santana*.

In addition, Petitioners suggest that the fact situation in *Storie* and the opinion of the Eighth Circuit is a classic example of the confusion that exists concerning the distinction between the ultimate issue of the case and the issue of qualified immunity from trial based upon the application of the doctrines in *Harlow, supra*. Petitioners suggest that a treatment of the issues in *Storie* and a reversal of the Eighth Circuit's decision will significantly instruct in the dichotomy of issues between qualified immunity and the ultimate issues of the case and further reinforce and affirm the doctrines in *Harlow*.

II.

Whether a police officer is entitled to qualified immunity measured by the objective standards as set forth in *Harlow* with regard to a claim of excessive force is an important and significant issue.

In addition, the Court affirmed the Trial Court's overruling of the officers' Motions for Summary Judgment with regard to the issue of qualified immunity concerning the question of excessive force finding a fact issue exists relative to the four pronged test as set forth in *Putnam v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981), which applies a subjective standard of intent relative to the application of force. (p. 20a, *infra*) It is the position of Storie and Whitted, that the objective test of *Harlow* should be applied in determining whether they are entitled to qualified immunity from trial with regard to the issue of excessive force.

The very recent case of *Graham v. Connor*, 57 U.S.L.W. 4513 (1989), points out that a claim of damages under 42 U.S.C. §1983 is not a cause of action founded on some generic standard or basic principles to be found in §1983 jurisprudence, but rather that such claims must be brought as a violation of a specific constitutional amendment, more particularly, the Fourth Amendment. The court did away with the four pronged subjective test followed by the circuits in measuring whether excessive force had been applied to a suspect and asserted an objective standard such as found in *Scott v. United States*, 436 U.S. 128, 137-139 (1978).

Because a Fourth Amendment right is the basis of a cause of action for use of excessive force, and such must be measured by an objective standard, it is the position of Storie and Whitted that qualified immunity should also attach to any such claim measured by the standards set forth in *Harlow*.

III.

The decision that if a conflict of fact exists with regard to a fact specific issue which is pivotal to qualified immunity such issue must be tried as a part of the trial of all of the issues of the case, raises important and unresolved issues.

The Trial Court, in his Memorandum Decision (See p. 1a, *infra*), overruled Defendants' Motion for Summary Judgment on the issue of qualified immunity, finding that conflict of fact existed concerning the pivotal issue of whether Plaintiff was on his porch and therefore could be deemed to be in a public place or whether he was

standing in the doorway of his home and therefore would be entitled to Fourth Amendment protection. The Court indicates that it will follow the process established by the Eighth Circuit in *Warren v. City of Lincoln*, 816 F.2d 1254 (8th Cir. 1987). In the *Warren* case, the Eighth Circuit panel remanded an issue of fact pivotal to qualified immunity to the District Court for submission to the jury along with the issues of the main action.

Initially, the jury had tried all issues, including qualified immunity, and found for the Defendants. The panel reversed, finding, among other reasons, that the Court had misinstructed on the issue of qualified immunity. Prior to retrial, the Eighth Circuit reheard the matter *en banc*, determined that the initial decision of the jury was correct with regard to issues of the main action, and affirmed the verdict, rendering moot the issue of retrial of the question of qualified immunity. A dissent, however, reaffirmed the procedure of trial of the immunity issue, along with other issues of the case. *Warren v. City of Lincoln*, 864 F.2d 1436 (8th Cir. 1989). It is that procedure that Judge Urbom indicates he will follow in Storie in his Memorandum and it is that decision that was affirmed by the Eighth Circuit.

It is clear from *Harlow, supra,* and *Mitchell v. Forsyth*, 475 U.S. 511 (1985), that the doctrine of qualified immunity addresses a right to be free from trial or answer for alleged wrongful acts. As stated in *Mitchell:*

> . . . The entitlement is an *immunity from suit* rather than a mere defense of liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Id. at 527 (emphasis in original).

If, indeed, a material factual dispute exists that is pivotal to Defendants' claim of qualified immunity, it is clear that a separate trial must be had on the issue and a final appealable Order entered.

CONCLUSION

For the foregoing reasons, Petitioners urge the Court to grant their Petition. This matter includes extension of the doctrine of qualified immunity to arrests made for misdemeanors, the question of procedures to be followed if a fact issue exists relative to pivotal facts underlying a claim of qualified immunity and extension of qualified immunity, and the objective test therefore, in a claim of excessive force.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KENNETH DUNCAN, Plaintiff, vs. CLYDE STORIE, et al., Defendants.	) CV86-L-218)) MEMORANDUM AND) ORDER ON DEFENDANTS') MOTION FOR SUMMARY) JUDGMENT)	

(Filed Sep 1, 1987)

The obligation of the movant on summary judgment is to show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) Federal Rules of Civil Procedure.

Several interesting and challenging legal questions are presented by this case, but the one that the defendants have failed to deal with in their brief is whether a warrantless arrest in the arrestee's home is violative of a constitutional right. There may be some factual and legal issues as to whether an arrest was made within the home or immediately outside the home, following the forcible pulling of the plaintiff from his home, but in any event the obligation is upon the defendants to show that there is no genuine issue of fact and that they are entitled to a judgment as a matter of law. This they have failed to do.

IT THEREFORE IS ORDERED that the motion for summary judgment, filing 45, is denied, except as to the plaintiff's claim under 42 U.S.C. § 1981, which the plaintiff acknowledges is not a viable claim.

Dated September 1, 1987.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KENNETH DUNCAN, Plaintiff,	)	CV86-L-218
vs.	)	ORDER
CLYDE STORIE, et al., Defendants.	)	

(Filed Nov 4, 1987)

Based on the explanation given in the accompanying memorandum,

IT IS ORDERED that the order of this court dated September 1, 1987, is amended to include an express denial of the defendants' motion for summary judgment on the grounds of qualified immunity.

Dated November 4, 1987.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KENNETH DUNCAN, Plaintiff,	) CV86-L-218
vs.	) AMENDMENT TO MEM-
CLYDE STORIE, et al., Defendants.	) ORANDUM AND ORDER) ON DEFENDANTS') MOTION FOR SUMMARY) JUDGMENT

(Filed Nov 4, 1987)

On September 1, 1987, I entered an order denying the defendants' motion for summary judgment because I determined that the defendants, Clyde Storie and Daniel Whitted, failed to show that no genuine issue of material fact remained to be resolved in the case. Specifically, I identified a factual dispute regarding whether the warrantless arrest was made inside or immediately outside the home of plaintiff Kenneth Duncan. My order makes no mention of the defense of qualified immunity that was raised by the defendants and accordingly, the defendants have appealed.

On October 10, 1987, plaintiff's counsel brought to my attention *Craft v. Wipf*, 810 F.2d 170 (8th Cir. 1987). The *Craft* defendants appealed a district court's entry of summary judgment in favor of the plaintiff, arguing that the district court's order failed to address the issue of qualified immunity. The *Craft* court relied on the United States Supreme Court's statement in *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), that "a district court's denial of a claim of qualified immunity, to the extent that it turns on

an issue of law, is an appealable 'final decision' . . . notwithstanding the absence of a final judgment." *Id.* Because a denial of qualified immunity generally is an appealable final order, and because the Eighth Circuit court believed that the district court is in a more favorable position than is the appellate court to judge which facts or alleged facts should constitute the basis of decision, the *Craft* court remanded the case to the district court for its ruling on the merits of the qualified immunity defense.

The *Craft* Court advocated the widespread use of summary judgment motions to dispose of cases on qualified immunity grounds and discussed the factual/legal dichotomy with which the qualified immunity analysis struggles. Although the *Craft* opinion recounts the facts of the case, it does not discuss the facts that were allegedly disputed. The wording of the *Mitchell* holding, *supra*, indicates that if the disposition of a qualified immunity defense hinges on a factual issue rather than a legal issue, the district court's order may not be immediately appealable. I find that such a factual issue is present in this case, making disposition of the qualified immunity defense imprudent on a summary judgment motion. In light of the concern by the attorneys who represent the parties to this lawsuit, I have decided to amend my order of September 1, 1987 to discuss the qualified immunity issue.

The good faith, or qualified immunity, defense has historically been composed of both objective and a subjective aspects. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). The *Harlow* Court explained that "[t]he objective element involves a presumptive knowledge of and

respect or 'basic, unquestioned constitutional rights.' . . . The subjective component refers to 'pe[illegible]issible intentions.' " *Id.* (citations omitted). In recent years, the United States Supreme Court has attempted to minimize the significance of the subjective element of the qualified immunity defense and accordingly, the Court has clarified the scope of the objective element. In *Anderson v. Creighton*, 55 U.S.L.W. 5092, 5093 (June 25, 1987), the Court restated the standard set forth in *Harlow*:

> [W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action assessed in light of the legal rules that were clearly established at the time it was taken.

Id. (citations omitted). Because the question of the defendants' qualified immunity cannot be answered with reference to both elements, or in the preferred manner with reference to the objective element alone, I will expressly deny the defendant's motion for summary judgment on the qualified immunity defense.

Two primary determinations must be made by courts that consider the qualified immunity defense according to *Anderson*. First, a court must determine whether the right that the official is accused of violating was clearly established under the law. The *Anderson* Court explained that clearly established means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* The Court emphasized that it is not sufficient for a court to determine whether the right asserted by the plaintiff is well established. In addition, a court must consider the

situation from the perspective of the official and ask whether the law had *not* established at the time the action was taken that the officer's actions violated the plaintiff's right. *Id.*

Second, the *Anderson* Court stated that the court will usually be forced to determine the extent of the "information possessed by the investigatory officials." *Id.* The Court warned that this inquiry should not reintroduce the subjective element into the qualified immunity analysis; the official's subjective beliefs about the allegedly unconstitutional actions are irrelevant. *Id.* Rather, the inquiry should help to objectively answer what a reasonable officer who was possessed of the investigatory officer's information would have believed was constitutional in light of the established law. *Id.*

The defendants' argue that their arrest of Duncan was justified under the Nebraska statutes. In the depositions of the defendants, they state that Duncan voluntarily exited his house and stepped onto his porch at which time the arrest was conducted. See Deposition of C. Storie, part of filing 35, 15:5-9; Deposition of D. Whitted, part of filing 35, 30:12, 31:1-4. To the contrary, Duncan testified in his deposition that the defendants opened the door to this house and forcibly pulled him from where he stood inside the house onto the porch and made the arrest there. Deposition of K. Duncan, part of filing 35, 40:15-20. The central constitutional claim raised by Duncan is that he was unlawfully arrested in violation of his fourth amendment right to be free from unreasonable searches and seizures. Different constitutional standards apply in resolving fourth amendment warrantless arrest issues depending on whether the arrest was made in a

public place or whether it was made in the arrestee's home.

The standard for a warrantless arrest in a public place was stated by the Supreme Court in *United States v. Watson*, 423 U.S. 411 (1976). The *Watson* Court stated that a peace officer has the authority to make a warrantless arrest of an individual in a public place provided that the officer has probable cause. A different constitutional standard applies to warrantless arrests when they are made within the arrestee's home. In order to have acted constitutionally in making a warrantless arrest in an arrestee's home, the officer must show that exigent circumstances sufficient to excuse the absence of a warrant existed. *See, Ker v. California*, 374 U.S. 23, 40-42 (1963).

The defendants apparently rely on their alleged finding of probable cause and upon Nev. Rev. Stat. §29-404.02, which permits a peace officer to make an arrest if a misdemeanor is committed in the officer's presence, in seeking qualified immunity. If the arrest was made, as the defendants claim, outside Duncan's house, then they would likely be immune from suit under the law that applied at the time. Although there is a sense that Storie and Whitted would not have so ardently pursued the matter had Storie and Duncan not had a history of disagreements between them, this evidence indicates that they acted in an objectively legally reasonable manner.

Under Neb. Rev. Stat. §28-1310, a person who places a phone call can be found to have committed the class III misdemeanor of intimidation by phone call if the call is made with the intent to at least annoy or offend, and uses

language that is at least indecent. Portions of the depositions of Duncan, Storie and Whitted could be read to indicate that the defendants had probable cause to make a warrantless arrest of Duncan in a public place. Deposition of K. Duncan, part of filing 35, 31:25, 32:1-2 (recounting the language used during the conversation); Deposition of C. Storie, part of filing 35, 17:13-15 (stating that Storie found the language "objectionable"); Deposition of D. Whitted; part of filing 35, 28:19-22 (expressing his belief that the facts indicated a violation of the statute). Furthermore, Nev. Rev. Stat. §1310(2) states that use of "indecent, lewd or obscene language . . . shall be prima facie evidence" of the intent required by the statute.

The defendants also seem to justify their actions under a Nebraska statute that empowers a police officer to make a warrantless arrest in cases in which the officer has reasonable cause to believe that a misdemeanor has been committed in the officer's presence. *See* Nev. Rev. Stat. §29-404.02. Relying on the standard articulated in *Anderson*, this court may determine that the law of Nebraska has not clearly established whether receiving an phone call that falls within Nev. Rev. Stat. §28-1310 sufficiently puts an officer in the presence of the alleged offender so as to make a warrantless arrest under Neb. Rev. Stat. §29-404.02. Although Storie and Whitted were not physically present in Duncan's home at the time that Duncan placed the call, the offense may be considered to have been committed in Storie's presence. The call was directed to Storie and he participated in the conversation, both of which could have given Storie reasonable cause to believe that a misdemeanor was being committed in this presence. Neither of the defendants' theories can be the

basis of a finding of qualified immunity upon a motion for summary judgment. The evidence can be considered only after a jury has determined that the arrest was made on the porch after Duncan voluntarily stepped outside his house.

An entirely different result would probably be reached if the plaintiff's version of the facts was proven. The plaintiff claims that the arresting officers forcibly pulled him from inside his home onto the porch of the house where the defendants arrested him. Warrantless arrests in homes have been upheld based on a finding of exigent circumstances such as an officer's belief that the arrestees would flee the jurisdiction, would destroy evidence or would harm society or themselves. *See Ker v. California, supra; Warden v. Hayden,* 387 U.S. 294, 298-99 (1967). In his deposition, Storie testified that he did not know whether Duncan would act in a manner that would give rise to exigent circumstances and he indicated that he had no reason to believe Duncan would. Deposition of C. Storie, part of filing 35, 24:16-25, 25:1-7.

The apparent absence of exigent circumstances is also indicated by recent case law. The Supreme Court in *Welsh v. Wisconsin,* 466 U.S. 740, 753 (1984), and the Eighth Circuit Court in *Patzner v. Burkett,* 799 F.2d 1363, 1368 (8th Cir. 1985), have held that the seriousness of the offense for which the arrest is made is a consideration that has great significance in determining whether exigent circumstances sufficient to justify a warrantless arrest in the home exist. The *Welsh* Court acknowledged that the state-imposed penalty for a crime is the most consistent measure of the gravity of the offense. Intimidation by phone call is a class III misdemeanor in Nebraska. These factors

would be considered by the court if the jury determines that the arrest was made only after the defendants pulled Duncan from his house against his will.

In *Warren v. City of Lincoln*, 816 F.2d 1254, 1262 (8th Cir. 1987), the Eighth Circuit remanded a case to the district court and seized the opportunity to reiterate that whether a defendant is entitled to qualified immunity is a question of law to be decided by the court. The plaintiff in *Warren* was arrested by the police under the authority of a traffic warrant but was extensively questioned about a burglary that had been committed in the vicinity in which he was apprehended. The *Warren* Court attempted to clarify the procedural questions that exist due to the factual and legal dichotomy that is everpresent in qualified immunity analysis. The Eighth Circuit directed that:

> On remand, the jury should initially determine under proper instructions whether the arrest of Warren was a pretext employed to gather evidence of unrelated crimes. If the jury determines that it was a pretext, then the district court should determine whether the law prohibiting pretextual arrests was clearly established [at the time the officers made the arrest]. If the jury finds that the arrest was not pretextual but rather a lawful arrest pursuant to a traffic warrant, then [the district court] should determine whether Warren was detained beyond the time necessary to process the traffic offense for questioning on an unrelated matter. If the jury determines that he was so detained, then the district court should determine whether the law prohibiting such a detention was clearly established [at the time the officers made the arrest].

Id. Although this process is convoluted, I believe something similar in this case is necessary. The jury must first decide whether Duncan voluntarily stepped onto the

porch and the arrest was made thereafter, or whether the defendants opened the door to Duncan's house and forced Duncan onto the porch so that they could make the arrest. Only after such a finding is made will the court be in a position to rule on the issue of the defendants' qualified immunity defense.

Dated November 4, 1987.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2369

Kenneth Duncan, Appellee, v. Clyde Storie, Individually and in his official capacity as a County Sheriff, Thurston County, Nebraska; and Daniel Whitted, individually and in his official capacity as a Deputy County Sheriff, Appellants.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: June 13, 1988
Filed: March 13, 1989

Before LAY, Chief Judge, BROWN,* Senior Circuit Judge, and WOLLMAN, Circuit Judge.

LAY, Chief Judge.

This suit arises under Title 42 U.S.C. § 1983. It comes here on an interlocutory appeal from a denial of summary

*THE HONORABLE JOHN R. BROWN, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

judgment by the district court.[1] *See Mitchell v. Forsyth*, 472 U.S. 511, 524-530 (1985).

At the time the events in issue took place, Kenneth Duncan was the Chief of Police and Captain of the Volunteer Rescue Squad in Emerson, Nebraska and Clyde Storie was Sheriff of Thurston County. For some time prior to December 23, 1985, there had been an ongoing dispute between Duncan and Storie, whose jurisdictions overlap geographically, regarding the proper procedure for transporting bodies of deceased persons from the scene of the death. Storie required rescue squad personnel to inform his office prior to transporting these bodies to enable his staff to conduct an investigation into possible foul play.

On December 23, 1985, Duncan ordered the removal of a deceased person from a residence in Emerson before informing the Thurston County Sheriff's Office. A few days later, on December 26, Duncan and Storie had a telephone conversation concerning this matter. During this conversation, Storie, who was disturbed by Duncan's failure to notify his office, threatened to revoke the town's permit to have a red light on its rescue vehicle. Storie called Duncan an "asshole." Duncan responded by calling Storie a "fucking asshole" and threatened to haul his "fucking shrimp ass in[to] court."

Later on the same day as the phone call, Storie and Daniel Whitted, a Thurston County Deputy Sheriff, drove to Duncan's home. Duncan observed their arrival and,

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[1] The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

believing that they had come to pick up his written report on the transportation of the dead body, opened the front door to meet them. According to Storie and Whitted, when Duncan realized that they were there with regard to the alleged intimidating phone call, he stepped outside onto the porch and began to argue with them. At that time Storie decided to place Duncan under arrest for making an obscene phone call and a wrestling match ensued. Whitted applied a stun gun to Duncan which enabled the officers to handcuff him and transport him to the Sheriff's office.

Duncan contends that he had remained inside his front door when the officers arrived.[2] He attempted to close the door as soon as he ascertained that they had come to arrest him for making an intimidating phone call. The officers, however, prevented him from doing so and pulled him out of his home. Duncan was then wrestled to the ground where he received repeated applications of the stun gun before being handcuffed and placed in the squad car.

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[2] Duncan's deposition provides the following description of the arrest:

> I said, here's the report, Clyde. And he said, that's not what I'm here for. Come outside. And I said, no, I'm not going to come outside. I've told you before and I'm not arguing with you about this. I'll see you in court.
>
> If that's the way you want it, I'll see you in court, and I handed the report out to him. He started to pull the door opened. And when he pulled on the door, I reached for the door, he grabbed my left hand, the Deputy grabbed my

(Continued on following page)

Duncan filed an action against the officers under section 1983 in federal district court alleging unlawful arrest and excessive use of force. The district court denied defendants' motion for summary judgment. The court stated that a ruling on the availability of qualified immunity would be premature until factual findings were made regarding the circumstances surrounding the arrest.

Legality of the Arrest

Depending upon whether Duncan was arrested in his home or outside in a public place, different standards apply to evaluate the constitutionality of this warrantless arrest. If an individual voluntarily left the confines of his home, as Storie and Whitted claim that Duncan did, then the arrest was made in a public place. *United States v. Santana*, 427 U.S. 38, 42 (1976). Under these circumstances, the individual has no expectations of privacy and the arresting officers need only demonstrate that there was probable cause in order to justify a warrantless arrest. *United States v. Watson*, 423 U.S. 411, 423-24, *reh'g denied*, 424 U.S. 979 (1976). However, a warrantless arrest

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(Continued from previous page)

right arm, pulled me outside the house onto the porch and started to wrestle me tot the ground.

When they were wrestling me to the ground, I felt that there was probably going to be more than just an arrest or whatever here because they said as they were pulling me out, Clyde said, we're going to – I'm going arrest you for making an intimidating phone call.

Duncan Dep. at 40, lines 11-25.

that occurs inside an individual's home is unconstitutional unless the officers demonstrate the existence of probable cause and exigent circumstances.[3]

The doorway of an individual's home or apartment or hotel room may be a public place for the purpose of making a warrantless arrest if the individual has come to stand in the doorway voluntarily. *See United States v. Whitten*, 706 F.2d 1000, 1015 (9th Cir. 1983). However, an individual who is compelled to stand in a doorway cannot be lawfully arrested without the existence of probable cause and exigent circumstances. *See United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1986); *United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984). The same standard applies when officers deceive an individual in order to bring him to the door. *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537 (1982).[4]

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[3] In determining whether exigent circumstances exist, the following criteria are considered: (1) seriousness of the alleged offense; (2) reasonable belief that the suspect is armed; (3) clear showing of probable cause to believe that the suspect committed the alleged offense; (4) strong reason to believe that the suspect is on the premises; (5) likelihood that the suspect will escape if not swiftly apprehended; and (6) entry may be made peaceably. *United States v. Kulcsar*, 586 F.2d 1283, 1287 (8th Cir. 1978).

[4] In addition to the existence of probable cause and exigent circumstances, this court has examined the record for egregious police misconduct when evaluating the propriety of a doorway arrest. *United States v. Davis*, 785 F.2d 610, 615 (8th Cir. 1986).

It is well established that a warrantless arrest within the confines of the home, barring exigent circumstances, is unconstitutional. The defendants concede the absence of exigent circumstances in this case, but urge that under the *Santana* decision an officer might reasonably believe that Duncan's appearance at the door constituted entrance into a public place. They argue that the cases are in conflict as to when the doorway of a home constitutes a public place, and that this conflict provides objective reasonableness for failing to comprehend any constitutional violation in this case. Thus, the defendants contend that they should be entitled to qualified immunity. We disagree.

In *Santana*, the Supreme Court took particular care to point out that the individual who was arrested was "standing directly in the doorway – one step forward would have put her outside, one step backward would have put her in the vestibule of her residence." 427 U.S. at 40 n.1. We think it unwise to become preoccupied with the exact location of the individual in relation to the doorway. *Cf. United States v. Carrion*, 809 F.2d 1120, 1128 n.9 (5th Cir. 1987). As the case law discussed previously illustrates, the crucial issues involve the individual's reasonable expectation of privacy and whether that individual came to the doorway voluntarily.[5]

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[5] In *Santana*, for example, the suspect was not summoned to the door. In fact, she was already standing in the open doorway of her home when the police arrived and identified themselves. 427 U.S. at 40. It was at that time that she retreated to the vestibule. *Id.* The Court found that the doorway was a

(Continued from previous page)

The existence of genuine issues of material fact is evident in this case. The parties dispute whether the arrest occurred in a public place. Storie and Whitted contend that Duncan stepped out on the porch voluntarily. Duncan, however, asserts that he had simply opened the door and remained in the home. Storie then requested him to come outside. Duncan refused to accede to this request. Duncan had answered the door for the sole purpose of handing the report out to the officers. When it was apparent that the officers were not there for the report, Duncan stepped farther back into the house and attempted to close the door. It was at that time that Duncan claims he was pulled from his home by the officers. A jury could find that Duncan's attempt to retreat, much like the suspect's retreat in *Santana*, placed him firmly inside his home and the officers would be required to demonstrate exigent circumstances.[6] Under Duncan's version, which we must credit for the purpose

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(Continued from previous page)

public place under these circumstances. *Id.* at 42. It was, however, the existence of exigent circumstances – "a true 'hot pursuit' " – that permitted the officers to pursue the suspect inside her house. *Id.* at 42-43 & n.3 (*citing Warden v. Hayden*, 387 U.S. 294, 298 (1967) and *Johnson v. United States*, 333 U.S. 10, 16 n.7 (1948)). *See also United States v. Martinez-Gonzalez*, 686 F.2d 93, 101 (2d Cir. 1982).

[6] If this were the case, the officers have already conceded liability: "If this case turns upon the issue of the presence of exigent circumstance, Appellants lose." Appellant's reply brief at 3. Indeed, "it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984).

of reviewing the denial of summary judgment, Storie and Whitted did not announce their intention to arrest Duncan until he was pulled out of his home.[7] Under this version it would be impossible to hold as a matter of law that he voluntarily placed himself in a public place and willingly relinquished the expectation of privacy that he is entitled to when he is within his home. Duncan's version of the arrest asserts violations of clearly established constitutional rights and it would be improper to grant summary judgment before the finder of fact has determined these issues.

Excessive Use of Force

"A plaintiff may recover for excessive use of force [used in effecting an arrest] under § 1983 if the degree of force used was unreasonable under the circumstances, or if the force was used for an improper purpose." *Patzner v. Burkett*, 779 F.2d 1363, 1371 (8th Cir. 1985).[8] The alleged use of excessive force is generally an issue of fact. *Id.* In this case, Duncan alleges that he was savagely beaten and

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[7] In fact, Storie and Whitted concede they did not decide to make the arrest until after Duncan was outside the house and allegedly became uncooperative and abusive. *See* Storie Dep. at 15, lines 3-13, and Whitted Dep. at 31, lines 6-12.

[8] In determining whether the use of force was reasonable and properly motivated, the court must consider "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* (*quoting Putnam v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981)).

that the officers tortured him with repeated applications of a stun gun. He asserts that these actions were in excess of the force required to make the arrest. The officers, of course, deny these allegations and maintain that they used only that force necessary to subdue Duncan, who resisted their efforts, and place him in the police car. The existence of a genuine issue of material fact is made apparent by these two very different versions of the arrest. The alleged use of excessive force is therefore a proper issue for the trier of fact to determine.

The judgment of the district court in denying the defendants' motion for summary judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-2369NE

Kenneth Duncan, Appellee, v. Clyde Storie, Individually and in his official capacity as a County Sheriff, Thurston County, Nebraska; and Daniel Whitted, individually and in his official capacity as a Deputy County Sheriff, Appellants.	* * * * * * * * * * * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska. (April 27, 1989)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

March 13, 1989

Appellee will recover from appellants the sum of $28.50 for taxable costs on appeal.

A true copy.

ATTEST: Robert D. St. Vrain

Clerk, U.S. COURT OF APPEALS, EIGHT CIRCUIT

MANDATE ISSUED: 4/25/89

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2369NE

Kenneth Duncan,	*	
	*	
Appellee,	*	Appeal from the United
vs.	*	States District Court for
	*	the District of Nebraska.
Clyde Storie, etc., et al,	*	
	*	
Appellants.		

Appellants' suggestion for rehearing en banc has been considered by the Court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc.

The petition for rehearing is also ordered denied.

April 18, 1989

Order entered at the Direction of the Court:

Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

. . .

(As amended June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

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28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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28 U.S.C. § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done

in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purpose of this section–

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Neb. Rev. Stat. § 28-1310 (Reissue 1985) Intimidation by phone call; penalty; prima facie evidence. (1) A person commits the offense of intimidation by phone call if with intent to terrify, intimidate, threaten, harass, annoy, or offend, he:

(a) Telephones another anonymously, whether or not conversation ensues, and disturbs the peace, quiet, and right of privacy of any person at the place where the calls are received; or

(b) Telephones another and uses indecent, lewd, lascivious, or obscene language or suggests any indecent, lewd, or lascivious act; or

(c) Telephones another and threatens to inflict injury to any person or to the property of any person; or

(d) Intentionally fails to disengage the connection; or

(e) Telephones another and attempts to extort money or other thing of value from any person.

(2) The use of indecent, lewd, or obscene language or the making of a threat or lewd suggestion shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy, or offend.

(3) The offense shall be deemed to have been committed either at the place where the call was made or where it was received.

(4) Intimidation by phone call is a Class III misdemeanor.

Neb. Rev. Stat. § 29-404.02 (Reissue 1985) Warrant; arrest; when not required. A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed:

(1) A felony; or

(2) A misdemeanor, and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested; (b) may cause injury to himself or others or damage to property unless immediately arrested; (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the officer.

U.S. Const. amend IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend XIV § 1 (1868).

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
JUL 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-131

In The

Supreme Court of the United States

October Term, 1989

CLYDE STORIE, Individually and in his official capacity as a County Sheriff, Thurston County, Nebraska; and DANIEL WHITTED, Individually and in his official capacity as a Deputy County Sheriff,

Petitioners,

vs.

KENNETH DUNCAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether the petitioners are seeking relief from a trial that has not yet occurred.

Whether the petition for a Writ of Certiorari is made for the sole purpose of delay, is frivolous, and should be denied forthwith.

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STATEMENT OF THE CASE

The petitioners submitted the question of qualified immunity on their motion for summary judgment. The Honorable Judge Warren Urbom and the 8th Circuit Court of Appeals both held the issue of qualified immunity cannot be determined upon the record made by the petitioners and that issue is still before the court. Judge Urbom and the 8th Circuit Court of Appeals both held there is a divergence of facts yet to be decided by a jury for a determination of: (1) exigent circumstances, (2) place of arrest, (3) excessive force, and (4) reasonable belief; upon which the issue of qualified immunity can be made.

The respondent's evidence is far different from the petitioners, and if believed, would establish the existence of the following facts:

This is an action to recover damages for deprivation of the Respondent's civil rights pursuant to 42 U.S.C. §§1983, 1988, that are protected by the first, fourth, fifth and fourteenth amendments to the United States Constitution. The action was filed in the United States District Court for the District of Nebraska. The Petitioners filed a motion for summary judgment claiming qualified immunity. The trial court, in its amended order of November 4, 1987, denied the motion for summary judgment; and the Petitioners are asking for a Writ of Certiorari from the ruling of the 8th Circuit Court of Appeals affirming that judgment.

On December 23, 1985, the Emerson, Nebraska, Rescue Squad was called to the residence of a Mrs. Bottger by her family. Three members of the rescue squad responded to the call. They were James Sherlock, the Fire

Chief of Emerson, Nebraska; Ken Duncan, the Police Chief of Emerson, Nebraska; and Colleen Duncan, the wife of Ken Duncan.

Upon arrival, they found that Mrs. Bottger, an elderly lady, was in the bedroom in bed; and they could not find a pulse. They immediately transported her to the hospital in Pender, and she was dead upon arrival at the hospital.

The next morning, Ken Duncan called the Sheriff's Office in Thurston County and reported to Mrs. Clyde Storie the fact that the call had been made and that a written report was available for the Sheriff upon the Sheriff's return to the county.

Three days later, on the 26th of December, Sheriff Storie returned to his office and was given the message from Police Chief Duncan regarding the rescue squad call. Sheriff Storie then immediately sent his deputy to Emerson, Nebraska, allegedly to investigate the matter, but instructed him to revoke the red light permit that was held by the Emerson Rescue Squad. Deputy Whitted went to the residence of Ken Duncan on one occasion and interrogated Mrs. Duncan regarding the incident. He informed Mrs. Duncan that he wanted to speak to Ken; and on two other occasions, he drove by the house apparently looking for Ken Duncan.

The Deputy also on two occasions appeared at the business establishment of James Sherlock, the Fire Chief. On the first occasion, in front of customers of Mr. Sherlock, he informed Mr. Sherlock that he was not happy with the way in which the rescue squad had handled the

call; and on the second occasion, he informed Mr. Sherlock that the people there were not as smart as they thought they were and that he didn't like Mr. Sherlock.

It was obvious from Deputy Whitted's behavior that his purpose in Emerson was not, in fact, to investigate the matter but was to harass and intimidate the members of the rescue squad.

When Ken Duncan returned to his residence, he was informed by his wife that the Thurston County Sheriff's office wanted to talk to him. He called and asked to speak to Sheriff Storie. In that conversation, Police Chief Duncan informed the Sheriff that he had a written report regarding the incident and could get the report to the Sheriff, and it was available for the Sheriff, and that he had previously left word with Mrs. Storie. Police Chief Duncan further stated that he was tired of the harassment, at which time Sheriff Storie interrupted and stated "Now listen, you asshole." Police Chief Duncan then said to the Sheriff: "No, you listen you fucking asshole. If this is the way it's going to be, I'll see your fucking shrimp ass in court." There was a pause, then both said good-bye to each other and hung up.

After that conversation, Sheriff Storie took his Deputy and drove 15 miles from Thurston County into Dixon County to the home of the Police Chief. At that time, both the Deputy and the Sheriff knew that they were leaving Thurston County and entering Dixon County. Sheriff Storie did not believe that Ken Duncan was going to avoid arrest, nor injure himself or anyone else. The Sheriff also knew that even if the phone call was an obscene call, it would be only a misdemeanor. While inside his

home, Police Chief Ken Duncan observed the arrival of the Sheriff and his Deputy and obtained the written report of the Rescue Squad call. He then opened his door and while still inside his home, attempted to hand the report to Sheriff Storie through the doorway. At that time, Sheriff Storie indicated he was not there for the report and told him to step outside. Duncan refused and attempted to shut the door. The Sheriff and the Deputy grabbed Ken Duncan by the arm, pulled Ken Duncan from his home, and wrestled Ken Duncan to the ground. Deputy Whitted then applied a stun gun to Ken Duncan's spine and pulled the trigger several times.[1] Both defendants placed handcuffs on Chief Duncan.

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[1] Introduced into evidence at the hearing on the issue of qualified immunity, Kenneth Duncan testified as follows in his deposition:

> A. I said, here's the report, Clyde. And he said, that's not what I'm here for. Come outside. And I said no, I'm not going to come outside. I've told you before and I'm not arguing with you about this. I'll see you in court.
>
> If that's the way you want it, I'll see you in court, and I handed the report out to him. He started to pull the door opened [sic]. And when he pulled on the door, I reached for the door, he grabbed my left hand, the Deputy grabbed my right arm, pulled me outside onto the porch and started to wrestle me to the ground.
>
> When they were wrestling me to the ground, I felt that there was probably going to be more than just an arrest or whatever here because they said as they were pulling me out, Clyde said, we're going to – I'm going arrest you for making an intimidating phone call.

(Continued on following page)

Ken Duncan was then placed in the back of the Sheriff's car and was transported across the county line to Thurston County, Nebraska. On the way to the Sheriff's Office, the Sheriff taunted Ken Duncan telling him he

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(Continued from previous page)

And I was afraid that there was going to be more than an arrest done here, and when they were rolling me down, I put my feet under the Sheriff's stomach, flipped him over the top of me. That's when he let go of my left hand and grabbed my neck.

The Deputy still had my arm behind me like this. They pushed me down on my knees on the porch, and I had my left hand for balance and my right arm was back like this.

And he had a choke hold on me and they had my left hand behind my back. At that point I was trying to put my shoulder down so that my face didn't hit the concrete and I could feel that this stun gun was being used on me.

And when I put my left hand behind my back, then my head went down and scraped on the concrete. And then they brought my right hand behind me, cuffed me and said, now you can get up and go to the car.

Q. Okay. Did you step out on the porch as he asked you to?

A. I certainly did not. And during this scuffling, that's when I told him, Clyde, you're in Dixon County. I'm in – and that's – this is all while this was going on.

Q. Did you feel when he came to the porch that he didn't have authority to arrest you in Dixon County?

A. Absolutely, but I didn't expect him to come and arrest me. I expected him to go and pick up a copy of the report as any professional police officer would have done.

would no longer have a job. Further words were exchanged on that trip. Later on, the Sheriff contacted the employers of Ken Duncan, including the Mayor, and informed them that Chief Duncan had been arrested and was acting irrationally. This was an attempt to have Chief Duncan fired. Duncan was suspended immediately after the telephone call from Sheriff Storie.

Ken received bruises and abrasions from the incident and continued to have difficulties, physically and emotionally, following the incident, including repeated nightmares about the incident. The charges of making an obscene phone call were dismissed by the County Attorney.

SUMMARY OF ARGUMENT

1. The Petitioners are asking for relief from a trial that has not yet been held on qualified immunity.

2. The Petitioners are asking this court to accept their version of disputed facts.

3. There is no legal basis for granting the Writ, and the petition for this Writ is frivolous, expensive, and time consuming.

ARGUMENT

Reasons for Denying the Writ

I. THE PETITIONERS ARE SEEKING RELIEF FROM A TRIAL THAT HAS NOT BEEN HELD.

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Anderson v. Creighton,* 107 Sup. Ct. 3034 (1987), the court established the rule that government officials are entitled to qualified immunity from suit insofar as their conduct does not violate clearly established statutes or constitutional rights of which a reasonable person would have known. In application of this rule, the court in *Mitchell v. Forsyth,* 475 U.S. 511 (1985), held that a denial of a motion for summary judgment regarding qualified immunity *"to the extent it turned on a question of law"* is an appealable final decision, stating such entitlement is an *"immunity from suit"* rather than a mere defense. The rationale is that an officer who has not violated clearly established constitutional rights should not have to go through a full trial.

The District Court and the Appeals Court in the case at hand has found the sworn statements of the respondent's witnesses were such that if believed, would constitute a clear violation of constitutional rights. That the petitioners' version is different and before the issue of qualified immunity can be made, the jury will have to determine the facts. The court's application of "clearly established" law would depend upon what facts the jury determined as being true. As stated on the last paragraph of the District Court opinion:

> The jury must first decide whether Duncan voluntarily stepped onto the porch and the arrest was made thereafter, or whether the defendants opened the door to Duncan's house and forced Duncan onto

> the porch so that they could make the arrest. Only after such a finding is made will the court be in a position to rule on the issue of the defendant's qualified immunity defense.

The Court of Appeals stated that there was a dispute as to material facts and that under Duncan's version:

> It would be impossible to hold as a matter of law that he voluntarily placed himself in a public place and willingly relinquished the expectation of privacy that he is entitled to when he is within his home. Duncan's version of the arrest asserts violations of clearly established constitutional rights and it would be improper to grant summary judgment before the finder of fact has determined these issues.

It is respectfully submitted that the petitioners' petition for the Writ has no merit and is made for the purpose of delay, and should be denied forthwith, on the above basis.

II. IT WAS A WARRANTLESS HOME ARREST WITHOUT EXIGENT CIRCUMSTANCES.

The respondent was arrested at his home on December 26, 1985. Five years prior thereto, it was clearly established that a warrantless home arrest, absent exigent circumstances, was a clear violation of a citizen's right against unreasonable search and seizure, protected by the fourth amendment, *Payton v. New York,* 445 U.S. 573 (1980), *State of Nebraska v. Schlothauer,* 206 Neb. 670, 294 N.W.2d 382 (1980). Exigent circumstances are determined by: (1) seriousness of the alleged offense; (2) reasonable belief that the suspect is armed; (3) clear showing of probable cause to believe that the suspect committed the

alleged offense; (4) strong reason to believe that the suspect is on the premises; (5) likelihood that the suspect will escape if not swiftly apprehended; and (6) entry may be made peaceably.

The petititoners are asking this court to rule as a matter of law that the Sheriff and his Deputy can travel to another county and harass the residents of that county, request them to contact the Sheriff's office, initiate vulgar – but not obscene – language in that phone call, and then again travel across the county lines and forceably pull a citizen from his home, wrestle him to the ground, twist his arm, stungun him, telephone his employers in an attempt to have him fired, and then claim all of this has been done in good faith and they should be immune from their actions because any reasonable officer would think he could do the same thing. That argument is frightening.

III. THERE IS NO SPLIT OF AUTHORITY ON DOORWAY ARREST

The petitioners also attempt to show there is a split of authority on whether, as a matter of law, an officer without a warrant can lawfully arrest a citizen who is standing inside the doorway to his home, on the officer's probable belief (and this is questioned) that a misdemeanor has been committed. There is no such split of authority, nor should there be. In the three cases cited by the petitioners where a warrantless home arrest was declared lawful, the gravity of the offense was much greater and exigent circumstances existed (in each case it was a felony). *U.S. v. Santana*, 427 U.S. 38 (1976), involved a felony narcotics case. Officers were in hot pursuit with

realistic expectations that evidence would be destroyed. *U.S. v. Whitten*, 706 F.2d 1000 (9th Cir. 1983), involved a felony drug charge with a finding of exigent circumstances of danger, flight, and destruction of evidence. *U.S. v. Davis*, 785 F.2d 610 (8th Cir. 1986), involved rape, the court finding a showing of exigent circumstances existed.

In the three doorway cases cited by the Petitioners where the arrest was declared illegal, like the case at hand, there were no exigent circumstances. In *U.S. v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), officers received complaint about five or six people shooting guns in a park. Officers followed defendant to his home, but waited for two hours before making a doorway arrest. Held, no exigent circumstances and arrest illegal. In *U.S. v. Houle*, 603 F.2d 1297 (8th Cir. 1979), after complaint of willful use of a dangerous weapon to commit an assault, officer waited until the next day to make an arrest in the suspect's bedroom - not doorway; no exigent circumstances existed. In *U.S. v. Johnson*, 626 F.2d 753 (9th Cir. 1980), obstructing correspondence by helping forge an endorsement on a check, and no exigent circumstances existed.

The issue as to whether Duncan was in the privacy of his home vs. a public place is yet to be determined from the facts. The petitioner is asking the court to rule as a matter of law that a citizen standing inside the doorway of his home can be arrested without a warrant on *the police officer's claim* he had reasonable cause to believe a minor misdemeanor offense had been committed. This has *never* been the law.

Rule 17 of the Court provides that a review on Writ of Certiorari is not a matter of right, but will be granted only when there are special and important reasons therefor. The petitioners have attempted to show a split of authority exists on the law involving factual issues in this case. No such split exists and the petition should be denied forthwith.

CONCLUSION

There is no legal basis for granting the Petition. The Petition is frivolous, expensive, and time consuming and should be denied forthwith.

Respectfully submitted,

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